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No. 03-1071

Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNTY OF OKANOGAN; EARLY WINTERS DITCH COMPANY, INC.; DAVID C. JONES; and FRANCES A. KAUL,

Petitioners,

v.

NATIONAL MARINE FISHERIES SERVICE; U.S. FISH AND WILDLIFE SERVICE; U.S. FOREST SERVICE; HARV FORSGREN, Regional Forester; and SONNY J. O'NEAL, Supervisor, Okanogan National Forest,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF WASHINGTON STATE FARM BUREAU, WASHINGTON STATE POTATO COMMISSION, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, WASHINGTON STATE GRANGE AND NEW MEXICO CATTLE GROWERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTRODUCTION

In *County of Okanogan v. National Marine Fisheries Service*, the Ninth Circuit erred in its analysis of federal authority to deprive private parties of their state granted water rights through the exercise of the authority to regulate rights-of-way across federal land.[1] 347 F.3d 1081 (9th Cir. 2003). In the decision under review by the Ninth Circuit, the Forest Service ("FS") required the maintenance of minimum instream flows in a river that crosses federal land before any water could be diverted to irrigation ditches used by the Early Winters Ditch Company and other water users ("Ditch Company"). The FS did this by placing restrictions on the right-of-way permits issued for the water conveyance. The Ditch Company has senior appropriated rights to the water that the FS restricted. The FS lacked the authority to confiscate water in this manner because the allocation of water is an area of law that has been consistently reserved to the states. The Ninth Circuit addressed the authority of the FS to regulate rights-of-way while ignoring whether the authority existed to infringe on the role of the state in allocating water. This Court should grant review of this decision because the Ninth Circuit failed to address the critical issue of federal authority to confiscate a water right granted by the State of Washington.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. This brief was authored by Karen Budd-Falen and Michael P. Van Tassell, attorneys of Budd-Falen Law Offices, L.L.C.

ISSUES

1. Whether the FS can assume the role of the State of Washington by reallocating state water rights through the exercise of the authority to place conditions on permits granting rights-of-way across federal land.

2. Whether the FS has the power to confiscate water granted to a private party by the State of Washington through the exercise of the authority to place conditions on permits granting rights-of-way across federal land.

3. Whether the FS' statutory authority to place conditions on permits granting rights-of-way across federal land allows the FS to usurp state water rights.

INTERESTS OF AMICUS CURIAE

Amicus Curiae Washington State Farm Bureau ("WFB") is a general farm organization with almost 35,000 member families dedicated to representing the interests of farmers, ranchers and others in the agricultural industry throughout the state of Washington. Washington State Farm Bureau, *This is the Washington State Farm Bureau* <http://www.wsfb.com/StateFarmBureau/WaFarmBureau History.htm> (last accessed Feb. 23, 2004). WFB members rely upon water rights for irrigation of two million acres of food, contributing an estimated $7 Billion to the economy. *Id.* Water rights not only feed thirsty crops and people, they have a profound effect on the value of private property. In Washington, non-irrigated farm or pasture land is worth from $100 to $500 per acre, while the same land irrigated sells for $3000 to $15,000 per acre. *Id.* Thus, the elimination of irrigation can reduce private property

values, in some cases, to less than 1% of original value. WFB members have a significant vested interest in the protection of water rights, as well as the associated means of diversion and conveyance. WFB directly represents the interests of the Ditch Company in this case.

The New Mexico Cattle Growers Association ("NMCGA") also has a substantial interest in the outcome of this case. Among the purposes for the creation of the NMCGA is to ensure the continued viability of public lands ranching in New Mexico. Many NMCGA members own water rights that occur on public lands. These water rights are critical for NMCGA members in establishing base property for grazing permits as well as for watering of cattle on private lands adjacent to public land. Without complete access to these water rights, the livelihood of these ranchers would be severely imperiled.

The Washington State Potato Commission ("WSPC") also has a vital interest in protecting state water rights that occur within the boundaries of public land. The mission of the WSPC is to serve the potato growers of Washington State. The potato growers of Washington are dependent on sufficient water to support their crops. A significant amount of water used by potato growers originates on public lands. The WSPC seeks to preserve the water rights that occur on public land to protect the interests of potato growers in the State of Washington.

The Washington State Grange ("WSG") is a grassroots fraternal organization with its roots in agriculture. The WSG seeks to provide a voice for rural citizens of Washington. The protection of water rights is critical to the survival of rural citizens that depend on water to sustain agricultural operations. If water rights that happen to

occur on federal lands are compromised, the repercussions could be widespread within the rural community that the WSG seeks to protect.

The Building Industry Association of Washington ("BIAW") is dedicated to ensuring and enhancing the vitality of the building industry for the benefit of its members and the housing needs of citizens. The BIAW is also committed to reducing the scope of government and expanding free enterprise. The federal government's assertion of power to confiscate private water rights under the guise of regulation is a serious expansion of governmental authority. The BIAW seeks to prevent governments from overstepping their bounds and negatively impacting private property rights. The precedent that will result if this governmental assertion of power is allowed to stand is unacceptable. When government authority expands, the interests of the BIAW are adversely affected.

SUMMARY OF THE ARGUMENT

The Early Winters Ditch conveys private water rights across public land managed by the FS. Claiming endangered species protection, the FS imposed minimum instream flows as a condition to issuing a special use permit ("SUP") to the Early Winters Ditch Company for use of the Early Winters Ditch. The SUP conditions were imposed because the FS had concluded that the ditches involved were "likely to adversely affect the steelhead and chinook salmon" and that minimum instream flows were the necessary remedy. *County of Okanogan*, 347 F.3d at 1083-84.

The Ditch Company sued, claiming that the FS did not have the authority to impose instream flows, nor was

it required to do so by the Endangered Species Act ("ESA"). The District Court ruled against the Ditch Company on all counts, holding that the FS can condition a SUP to require minimum instream flows to protect endangered species where consistent with the forest purposes. Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Cross Motion for Summary Judgment (Mar. 14, 2002). On appeal, the Ninth Circuit affirmed the District Court. *County of Okanogan*, 347 F.3d at 1082. The Ninth Circuit also found that the FS had authority to impose instream flows through restrictions in the use of ditch rights-of-way. *County of Okanogan*, 347 F.3d at 1086. The Ninth Circuit's decision rested primarily on authority found in the Federal Land Policy and Management Act of 1976 ("FLPMA"). *Id.* at 1084 (citing 43 U.S.C. § 1761(a)(1)). The Ninth Circuit made this finding without addressing the conflict with state water law that resulted from the actions of the FS.

The heart of this case lies in the Ninth Circuit's assumption that the FS' condition did not impact a water right or involve a *de facto* reservation thereof. The Ninth Circuit decision states that this case "is not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *County of Okanogan*, 347 F.3d at 1086 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917)). Nearly every part of the Ninth Circuit's opinion relies upon this assumption. Unfortunately, the assumption is incorrect as a matter of fact and law. The Ninth Circuit completely disregarded the conflict between federal and state authority in this case, therefore, this Court should

grant the petition for writ of certiorari to resolve this important issue.

STANDARD OF REVIEW

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." Among these compelling reasons are (1) a decision conflicting with precedent in another circuit; or (2) "an important question of law that has not been, but should be, settled by this court . . . ." *Id.*

The important federalism issues presented by the FS' decision and the Ninth Circuit's holding are important questions of law that should be resolved by this Court.

ARGUMENT

I. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Reallocate State Water By Requiring a Minimum Instream Flow as a Condition of a Special Use Permit Thereby Assuming the Role of the State in Appropriation of Water

For nearly 100 years now, the FS has been issuing SUPs to the Ditch Company, which allow the water right held by the Ditch Company to flow unimpeded through the half mile of the Early Winters Ditch that runs through federal land. In 1998, the FS changed this century old *status quo* by telling the Ditch Company that if it wanted to use its water right, it had to let the first 35 cubic feet

per second of its water right flow past the point of diversion. This minimum instream flow imposed on the Ditch Company is dominant in that the Ditch Company cannot divert a drop of its water right unless and until this flow is met. Thus, depending upon natural availability of water, the Ditch Company may be deprived of up to 100% of its appropriated water right.

The Ninth Circuit concluded that the FS' actions were "not a controversy over water rights" and, therefore, the FS could legally impose minimum instream flows as a condition of a SUP. *County of Okanogan*, 347 F.3d at 1086. The Ninth Circuit was wrong on both counts.

Specifically, the Ninth Circuit held that because the FS has the authority to regulate the use of the rights-of-way in a national forest to protect endangered fish, the FS had the authority to impose minimum instream flows as a condition to the SUPs. *Id.* The Ninth Circuit reviewed the history of the ditches and SUPs involved in the case. *Id.* at 1084. "The permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way." *Id.* at 1085. The FLPMA was cited, with support from other statutes, as granting authority to the FS to "'grant, issue, or renew rights-of-way over' public lands for 'ditches . . . for the . . . transportation . . . of water.'" *Id.* (citing 43 U.S.C. § 1761(a)(1)).

Although the Ninth Circuit acknowledged that the FLPMA was "subject to valid existing rights," this statement was only analyzed with regard to the right to use the ditches. *Id.* It was found that there were no vested rights to use the rights-of-way because the rights-of-way were "revocable at the discretion of the federal government." *Id.* The Ninth Circuit concluded its analysis by dismissing

any argument that this case had anything to do with state water law. "[T]he FLPMA specifically authorizes the [FS] to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the [FS] defer to state water law." *Id.* at 1086.

It is a long established rule, that "navigable waters uniquely implicate sovereign interests." *Idaho v. Couer d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). The power to control "navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *States of America v. Alaska*, 521 U.S. 1, 5 (1997), *reh'g denied*, 521 U.S. 1144. This power was guaranteed to the states by the federal government upon admission of the new states to the Union and is recognized as the Doctrine of Equal Footing. *Id.*; *see also Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845).

Pursuant to the Equal Footing Doctrine, the State of Washington retains the sole authority to regulate and condition the flow of water within the State of Washington. *States of America*, 521 U.S. at 5. The right of the states to regulate the water within the state has been recognized time and time again by Congress and the Courts. *See Couer d'Alene Tribe of Idaho*, 521 U.S. at 261; *States of America*, 521 U.S. at 1; *California v. United States*, 438 U.S. 645 (1978); *Kansas v. Colorado*, 206 U.S. 46 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899); *Hage v. United States*, 51 Fed. Cl. 570 (2002); *and see* 43 U.S.C. § 661 (1986); 43 U.S.C. § 371 (1986).

Washington law states that all waters within the state belong to the public, subject to all existing rights. Wash.

Rev. Code § 90.03.010 (1992). The only way to acquire a water right in the State of Washington is by appropriation. *Id.* No appropriation of water can occur until a permit to appropriate is issued pursuant to state law. *Id.* at § 90.03.250. The essence of an appropriated water right is the ability to put the water to beneficial use. *Offield v. Ish*, 57 P. 809, 810 (Wash. 1899). Without the diversion of an appropriated water right, the right is useless. *In re Water Rights In Crab Creek & Moses Lake v. Allen*, 235 P. 37, 39 (Wash. 1925).

Under Washington law, minimum instream flows are treated as appropriations. *Hubbard v. State of Washington*, 936 P.2d 27, 29 (Wash. Ct. App. 1997); Wash. Rev. Code. § 90.03.345. Only the Washington Department of Ecology can impose any such instream flow. "No agency may establish minimum flows and levels or similar water flow or level restrictions for any stream or lake of the state other than the department of ecology whose authority to establish is exclusive. . . . " Wash. Rev. Code § 90.03.247.

The State of Washington has exclusive power to control how water rights are vested, and holds exclusive authority to appropriate an instream flow. The FS' imposition of a minimum instream flow on a vested Washington water right directly usurps Washington law and sovereignty. The FS has reserved water to maintain a minimum instream flow in spite of Washington's stated authority over imposing such a requirement in waters within the State of Washington. *See Id.* The water in question has been appropriated under Washington law and constitutes a vested state water right. By placing a minimum instream flow requirement on these waters, the FS has taken the role of the State of Washington in the allocation of water resources within the State's sovereign borders.

The FS' actions in this case went well beyond an appropriation of a water right. When an instream flow is appropriated in Washington, that flow is considered a junior water right, subservient to all prior appropriations. *Id.* In this case, the FS requires that the Ditch Company give up the first 35 cubic feet per second of its water right for the privilege of transporting its water over a half mile of FS managed property. Thus, the FS did more than merely appropriate junior instream flow, it commandeered a portion of the Ditch Company's senior water right.

Depending on the amount of water present in the river, the Ditch Company will be denied the opportunity to exercise its vested state water right. In a period of low flow in the river there will not be sufficient water available to supply the amount of water appropriated under Washington state law as well as the amount of water demanded by the FS. The "regulation" imposed by the FS would require that the amount of water deemed necessary by the FS for fish be reserved and left untouched by any diversion of water. If there is a low flow then there will not be enough water in the river to allow the Ditch Company to obtain all the water that it is entitled to under its vested state water right. If the flow in the river is equal to or less than the amount that the FS has deemed necessary to protect fish, then the Ditch Company would be denied its entire vested state water right. The FS will have prohibited the exercise of the vested state water right. The FS will have asserted a water right senior to that of the Ditch Company's water right without even referencing state water law.

In *United States v. New Mexico*, 438 U.S. 696, 707-708 (1978), this Court ruled that Congress intended national forests to be reserved for two purposes: "to conserve the water flows, and to furnish a continuous supply of timber

. . . National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes" and, therefore, there is no implied reservation of water for other than the two main purposes. This Court went on to hold that with the passage of the Multiple Use Sustained Yield Act, "Congress intended the national forests to be administered for broader purposes after 1960 but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water." *Id.* at 715.

While the *New Mexico* case is not directly applicable to the present case because the FS is not claiming an implied reservation of water, the case does stand for the proposition that the FS cannot restructure or commandeer senior water rights. This is true in spite of the Ninth Circuit's assertion that the "FLPMA specifically authorizes the [FS] to restrict such rights-of-way to protect fish and wildlife and maintain water quality standards under federal law, without any requirement that the [FS] defer to state water law." *County of Okanogan*, 347 F.3d at 1086.

As this Court in *New Mexico* makes clear, the FLPMA does not give the FS authority to usurp state sovereignty over water rights for the benefit of wildlife. This Court should grant the petition for review to recognize the implications that the FS' decision has on state sovereignty and the lack of federal authority that federal agencies have to usurp the role of a state in allocating water rights.

II. This Court Should Grant the Petition for Writ of Certiorari Because This Case Implicates an Important Federalism Issue—Federal Authority to Commandeer Water Granted to a Private Party by State Law

It is difficult to understand how the Ninth Circuit can conclude that this "is not a controversy over water rights, but over rights-of-way through lands of the United States." *County of Okanogan*, 347 F.3d at 1086. The Ditch Company's water right is clearly a matter of Washington water law, and the FS clearly has required that the Ditch Company give up a portion of that property right for the privilege of conveying it over FS administered land. A similar situation would arise if the FS commandeered vehicles which happen to drive on FS roads on the pretext that such action is not about ownership and use of vehicles, but about the FS' lawful maintenance of roads. Regardless of the semantics, the practical outcome in both cases is the complete taking of private property by the FS for the privilege of using a FS right-of-way. The FS lacks the authority to do this under any statute.

There is no practical difference between limiting a water right through permit conditions and an outright taking of the water right. As the United States Court of Federal Claims states:

> In the context of water rights, a mere restriction on use – the hallmark of a regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. . . . Unlike other species of property where use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to

> use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder.

Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313, 319 (2001). In *Tulare*, the Bureau of Reclamation imposed minimum instream flows on water rights to benefit endangered species. The Court held that this amounted to a complete physical taking of plaintiff's private property, despite the fact that the Bureau never officially reserved or appropriated a water right as against all users. *Id.*

The present case is analogous to the *Tulare* case. In both cases, a federal agency imposed conditions on a state water right which effectively denied the holder a portion of that right, a compensable property interest. The fact that the Plaintiffs in this case have not yet brought a takings claim seeking money damages in the United States Court of Federal Claims is irrelevant to the outcome of the case before this Court. Indeed, if the FS' actions in this case do amount to the taking of a compensable property interest, then the Ninth Circuit's entire opinion crumbles. The Ninth Circuit's opinion is based on FS authority to regulate rights-of-way across FS land. The opinion states that the FS could revoke those rights-of-way at any time at the discretion of the FS. *County of Okanogan*, 347 F.3d at 1085. If the rights that are to be analyzed are vested state water rights rather than unvested, revocable rights to use a ditch, the Ninth Circuit's opinion is incomplete.

If the FS wished to impose a senior minimum instream flow to benefit wildlife, it could have done so by condemnation, after providing due process and just compensation. It

did not. Instead, it accomplished the same thing by "conditioning" a SUP. As the *Tulare* case illustrates, such conditions do amount to a physical taking of private property. The practical result of the FS' action is that the Ditch Company must give up a portion of its water right prior to exercising the remainder. The FS does not have the authority under applicable law to deprive the Ditch Company of its water rights. The Ninth Circuit erred in so holding.

The lack of treatment of state water rights in the Ninth Circuit decision ignores the practical and legal reality that the FS action has deprived the Ditch Company of its vested state water right. This Court should grant the petition for review to recognize the implication on private water rights and the lack of federal authority to usurp those rights.

III. This Court Should Grant the Petition for Writ of Certiorari Because the Ninth Circuit Opinion Misconstrues Federal Authority By Allowing the Forest Service to Usurp State Water Rights Through the Exercise of Authority to Regulate Rights-of-way

The Ninth Circuit cites the FLPMA for the FS' authority to require minimum instream flows as a condition to a SUP, thereby reallocating state water rights. *County of Okanogan*, 347 F.3d at 1085. The Ninth Circuit decision dismissed the effect on state water rights as irrelevant to the legal question at hand. *Id.* at 1086. However, the FS action requiring a minimum instream flow profoundly affects state water rights and compromises the longstanding doctrine of deference to the states with regard to allocation of water resources in the West. Whether federal

authority to regulate rights-of-way under the FLPMA allows the FS to reallocate state water rights is a significant issue that this Court should review.

Through the ESA Section 7 consultation process, the FS imposed amendments to the SUPs that are the subject of this case. *Id.* at 1083-84. The amendments provided that "instream flows on the river be measured and that diversions to the ditch be limited to maintain certain instream flows." *County of Okanogan*, 347 F.3d at 1084. These amendments were described as "reasonable and prudent measures" to provide for fish under the ESA. *Id.*; *see* 16 U.S.C. § 1536(b)(4). The Ninth Circuit held that the "placement of restrictions in the right-of-way permits was within the authority of the [FS]." *Id.*

The Ninth Circuit correctly noted that "the ESA does not grant powers to federal agencies they do not otherwise have." *Id.* at 1085; *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 225 (D.C. Cir. 1992) ("the [ESA] directs agencies to 'utilize their authorities' to carry out the ESA's objectives; it does not expand the powers conferred on an agency by its enabling act."). The Ninth Circuit went on to quote this Court in stating "that section 7 of the ESA 'amplifies the obligation of federal agencies to take steps *within their power* to carry out the purposes of this act.'" *Id.* (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183 (1978) (emphasis added, brackets omitted)). The Ninth Circuit then found "that the [FS] had the authority to restrict the use of the rights-of-way to protect the endangered fish." *Id.*

The FLPMA contains a savings clause that states "[n]othing in this Act shall be construed . . . (1) as affecting in any way any law governing appropriation or use of, or

Federal right to, water on public lands; (2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resource development or control." Pub. L. No. 94-579, § 701(g), *reprinted in* 43 U.S.C. § 1701 historical note. The FLPMA goes on to state that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* at § 701(h). Read as a whole, the savings clause is a neutral recognition of the status quo in state control over water.

The Ninth Circuit quoted portions of the savings clause and then found that the Ditch Company's "right-of-way permits did not grant vested property rights." *County of Okanogan*, 347 F.3d at 1085. This holding completely bypasses the pertinent issue in this case. The Ditch Company was not arguing that the FS action violated its vested rights in the right-of-way permits, it was arguing that the FS action violated its vested state water rights. These vested state water rights are property rights. *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). The FLPMA savings clause certainly applies to state water rights. The Ninth Circuit treated the entire case as a question of whether the FS had the authority to restrict rights-of-way on federal land. This is, at best, an incomplete analysis.

The savings clause protects water rights on federal land that existed before the passage of the FLPMA. Previous to the FLPMA, the Ninth Circuit held that federal law "approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by . . . the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." *Hunter v. United States*, 388 F.2d 148, 152 (9th Cir. 1967) (citing *California*

Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154-155 (1935)); *see Hallauer v. Spectrum Props.*, 18 P.3d 540, 552 (Wash. 2001) (holding that a landowner with a water right located on the property of another landowner is entitled to convey the water over the other landowner's property).

In *Hunter*, a national monument was established on federal land that Hunter had previously used for grazing. *Hunter*, 388 F.2d at 150-51. Hunter also had rights to water that had become surrounded by national monument land. *Id.* at 153. The United States brought the action to enjoin Hunter from grazing and watering cattle on the monument. *Id.* at 150. The Ninth Circuit found that Hunter could not continue to graze on the monument without a permit, but that Hunter's claim to water on the monument was a separate matter. *Id.* at 154. Even though the issue was not directly before the court, the Ninth Circuit found that where an individual had appropriated water rights on a national monument before establishment of the national monument, that individual "should be allowed a right of way over those lands to divert the water." *Id.* As in *Hunter*, this case involves previously appropriated water that the federal government is seeking to confiscate for a new federal purpose. The FS should be denied the authority to confiscate the water just as the National Park Service was in *Hunter*.

The FS does have authority to impose reasonable conditions on irrigation rights-of-way over federal lands. *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 103 (9th Cir. 1981); *see* 43 U.S.C. § 1761(b)(3). However, this authority does not allow the FS to commandeer state water rights in contravention of the savings clause. In 1997, a Congressionally created task force determined that the

authority to regulate rights-of-way was also subject to the savings clause. *See* Bennett Raley, et al., *Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of Pub. L. No. 104-127*, Part VI (1997). The task force concluded that the savings provision "makes it impossible for the [FS] to rely on FLPMA as a grant of authority . . . to impose bypass flow . . . requirements as a condition of land use authorizations." *Id.* Though the FS is granted authority to regulate rights-of-way across federal land, that authority does not allow the FS to use this authority to commandeer vested state water rights.

There is precedent that the FS may have some authority to regulate the exercise of state water rights on federal land. *See Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759 (D. Nev. 1995). In *Elko County*, ranchers sought unconditional access to maintain their ditches running through FS land. The Court held that the FS authority was limited to "reasonable" regulations. "[T]he authority [to] make rules and regulations . . . regarding the occupancy and use of the national forests . . . includes the right to reasonably regulate the exercise of vested water rights and accompanying rights-of-way obtained under 43 U.S.C. § 661." *Id.* at 764 (citations omitted). However, "reasonable" regulation, the Court stated, is "regulation which neither prohibits the ranchers from exercising their vested rights nor limits their exercise of those rights so severely as to amount to a prohibition." *Id.* (citing *United States v. Doremus*, 888 F.2d 630, 632 (9th Cir. 1989) (holding that mining operations conducted under a vested right, though subject to regulation, "'may not be prohibited nor so unreasonably circumscribed as to amount to a prohibition.'" (citation omitted))); *see also*

Hage, 51 Fed.Cl. at 576-77. This case involves not only regulation of the vested water right, but an actual confiscation of the water right. This confiscation amounts to a prohibition on the exercise of the vested water right. Therefore, the FS has materially restricted the use of the vested water right, such regulation is not "reasonable" and is not within the authority of the FS.

The FS lacks the authority under the FLPMA to usurp state water rights through the requirement of minimum instream flows. In this case, state water rights have been extinguished under the guise of FS authority to regulate rights-of-way. This contravention of longstanding federal deference to states with regard to allocation of water as well as the disregard of various portions of the FLPMA should be rectified. This Court should grant the petition for review to resolve the conflict between the Ninth Circuit decision and established law regarding federal authority under the FLPMA to confiscate state water rights.

CONCLUSION

The decision of the Ninth Circuit that the FS has the authority to confiscate vested state water rights through exercise of the authority to regulate rights-of-way over federal land is incomplete and incorrect. The Ninth Circuit dismissed discussion of state water rights in this case and limited its analysis to federal authority over rights-of-way. The FS has in fact attempted to claim a right to water senior to all other state granted water rights. This usurpation of the role of the State of Washington is not supported by the precedent of this Court, nor is it consistent with federal land law as proclaimed by Congress. This Court

should grant the Petition for Writ of Certiorari to address this important federalism issue and overturn the decision of the Ninth Circuit.

Respectfully submitted,

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